Before the
Administrative Hearing Commission
State of Missouri

ALBERICI CONSTRUCTORS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 10-1765 RS
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

DECISION

Alberici Constructors, Inc. ("Alberici") is not entitled to a refund of use tax it paid on the rental of cranes and a welder[1] it used for the construction of a cement manufacturing plant.

Procedure

Alberici filed a complaint on September 13, 2010, challenging the Director of Revenue's ("the Director") final decision denying Alberici's request for a refund of use tax paid for the rentals of cranes and a welder used by Alberici in a construction project. The Director filed an answer to the complaint on September 29, 2010.

We held a hearing on October 13, 2011. Alberici was represented by Edward Downey of Bryan Cave LLP. The Director was represented by Thomas A. Houdek and Christopher R. Fehr. The case became ready for decision on July 12, 2012, the date the last brief was filed.

[1] A "welder," for purposes of this decision, is defined as a machine used in welding. *Webster's Third New Int'l Dictionary* 2594 (unabr. 1986).

Commissioner Marvin O. Teer, Jr., having read the full record including all the evidence, renders the decision.[2]

Findings of Fact

1. On or before July 13, 2006, Alberici entered into a joint venture with Washington Group International, Inc., an Ohio corporation (the "Joint Venture").

2. On July 13, 2006, the Joint Venture, as contractor, entered into a construction management agreement with Holcim (US), Inc. ("Holcim"), as owner, for the construction of a new cement manufacturing facility (the "Manufacturing Facility") near Bloomsdale, Missouri, on the Missouri side of the Mississippi River.

3. The scope of Alberici's work on the Manufacturing Facility was to install process equipment for Holcim.

4. Once the process equipment was installed and the Manufacturing Facility was operational, the process equipment was used directly in manufacturing cement products, which products were intended to be sold ultimately for final use.

5. In order to perform the work set out in the construction management agreement, Alberici had to rent cranes and a welder.

6. The cranes and welder were solely required for the installation of Holcim's process equipment.

7. Alberici paid $440,075.39 for rental of the cranes and welder.

8. Included in the above-referenced $440,075.39 figure was $15,000 paid by Alberici to Bulldog Erectors Inc. ("Bulldog Erectors") for transportation of a crane to the Manufacturing Facility job site.

[2] Section 536.080.2; ***Angelos v. State Bd. of Regis'n for the Healing Arts***, 90 S.W.3d 189, 192-93 (Mo. App., S.D. 2002). Statutory references are to RSMo 2000 unless otherwise indicated.

9. The contract for rental and transportation of the crane was memorialized in an agreement between Alberici and Bulldog Erectors dated November 4, 2008. That contract, in addition to setting out the rental rate of $25,000 per month, provided as follows:

> **6. TRANSPORTATION:**
> Inbound Transportation: $15,000.00
> Outbound Transportation: $15,000.00
>
> ***Receive, unload, assemble, disassemble and load out is by customer.**
> Transportation: Lessee will arrange for and pay all shipping and freight from the shipping point to the job site specified in Article I hereof and returned to the return point, including but not limited to, demurrage, unloading, assembly, disassembly, load-out, handling, packing, crating, documentation, import and export clearances and transportation. Since the outbound method of shipment may differ from inbound, required load-out procedures may vary accordingly. If shipped via barge or vessel, of if the Equipment is loaded for use on board a barge or vessel, Lessee shall furnish to Lessor, prior to shipment of the Equipment, Certificate of Marine Trip Cargo and loading and unloading insurance to the stated value of Equipment specified in Article 1 hereof. Lessee shall inspect and inventory Equipment and obtain from delivery carrier written acknowledgement of any loss or damage to Equipment.[3]

10. Alberici paid $15,000 to Bulldog Erectors on November 20, 2008.

11. On May 11, 2010, Holcim executed a Sales/Use Tax, Tire and Lead-Acid Battery Fee Exemption Certificate, on the Director's Form 149, to Alberici. The certificate identified the product or service purchased as "crane rentals."

Conclusions of Law

We have jurisdiction over Alberici's appeal of the Director's decision.[4] Our duty in a tax case is not merely to review the Director's decision, but to determine the taxpayer's lawful tax liability for the period or transaction at issue by finding facts and applying existing law to those

[3] Respondent's Exhibit G, ¶ 6.
[4] Section 621.050.1.

facts.[5] Exemptions from tax are to be strictly construed against the taxpayer, and any doubt resolved in favor of application of the tax.[6] Alberici has the burden of proving that it is entitled to the refunds denied by the Director.[7]

Section 144.610.1 imposes use tax, as follows:

> A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased on or after the effective date of sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020. This tax does not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the article has become commingled with the general mass of property of this state.

Alberici claims an exemption from sales and use tax on a portion of its purchases of equipment and parts under § 144.030.2 which, at all relevant times, provided:

> 2. There are also specifically exempted from the provisions of the local sales tax law as defined in section 32.085, section 238.235, and sections 144.010 to 144.525 and 144.600 to 144.761 and from the computation of the tax levied, assessed or payable pursuant to the local sales tax law as defined in section 32.085, section 238.235, and sections 144.010 to 144.525 and 144.600 to 144.745:
>
> * * *
>
> (5) Machinery and equipment, and parts and the materials and supplies solely required for the installation or construction of such machinery and equipment, purchased and used to establish new or to expand existing manufacturing, mining or fabricating plants in the state if such machinery and equipment is used directly in manufacturing, mining or fabricating a product which is intended to be sold ultimately for final use or consumption[.[8]]

[5] ***J.C. Nichols Co. v. Director of Revenue***, 796 S.W.2d 16, 20-21 (Mo. banc 1990).

[6] ***Southwestern Bell Tel. Co. v. Dir. of Revenue***, 182 S.W.3d 226, 228 (Mo. banc 2005).

[7] Sections 136.300.1 and 621.050.2.

[8] RSMo Supp. 2011. A new paragraph (4) was added by 2012 H.B. 1402, S.B. 470, and S.B. 480, which renumbered these paragraphs as (5) and (6) respectively, although the language of the paragraphs did not change.

As to who may apply for a refund of sales tax paid and when such an application must be filed, § 144.190.2[9] provides:

> If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax pursuant to sections 144.010 to 144.525, and the balance, with interest as determined by section 32.065, shall be refunded to the person legally obligated to remit the tax, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of overpayment.

Section 144.696 applies § 144.190 to use tax.

The elements of a § 144.030.2(5) claim

In order to qualify for an exemption from use tax under § 144.030.2(5), Alberici must establish that:

- the cranes and welder were materials;
- those materials were solely required for the installation or construction of machinery or equipment;
- the materials, machinery, and equipment had to have been purchased and used to establish new or to expand existing mining, manufacturing, or fabricating plants in this state; and
- the machinery or equipment had to have been used directly in manufacturing, mining, or fabricating a product that was intended to be sold ultimately for final use or consumption.

Alberici asserted, and the Director did not contest, that it was building the Holcim plant in Missouri, that the Holcim plant was a new plant, that the cranes and welder at issue were solely required for the installation or construction of machinery or equipment at the Holcim plant, and that the equipment Alberici installed at the Holcim plant was to be used directly in manufacturing a product (cement) that was intended to be sold ultimately for final use or consumption. Therefore, except as to the transportation charge paid to Bulldog Erectors, which we discuss below, only the issue of whether the cranes and welder were "materials" remains.

[9] RSMo Supp. 2011.

Were the cranes and welder "materials?"

*The source of Alberici's claim—**E&B Granite***

Alberici cites ***E&B Granite, Inc. v. Director of Revenue***[10] in support of its position. In that case, the Supreme Court cited the *Webster's Third New Int'l Dictionary* definition of "material" in part, as follows:

> **1a**(1) **:** the basis matter from which the whole or the greater part of something physical is made (2) finished stuff of which something physical is made.
>
> **b**(1) **:** the whole or notable part of the elements or constituents or substance of something physical.
>
> **2**a **:** apparatus necessary for doing or making something.[[11]]

"Thus," the Court continued, "'materials' means either (1) the raw product from which something is made or (2) an apparatus necessary to make something."[12] Alberici asserts that this statement is the governing rule of this case. This position is understandable, since the statement appears to be a plain, clear definition of "materials." However, the Director asserts that we must give it more scrutiny.

We first examine Alberici's assertion in light of the context in which it was made. In ***E&B Granite,*** the taxpayer sought an exemption from sales tax it paid for raw granite it used to make countertops and other products on the grounds that the raw granite was "material" for purposes of § 144.054.2.[13] Opposing the taxpayer, the Director, relying on the dictionary definition of "material" cited above, argued that in order to qualify as "materials" for purposes of the exemption under that statute, the raw granite either had to be entirely consumed or be an

[10] 331 S.W.3d 314 (Mo. banc 2011).
[11] *Id.* at 318.
[12] *Id.*
[13] While Alberici's exemption claim arises under § 144.030, not § 144.054, both are sales and use tax refund statutes, and the Supreme Court has cited cases interpreting one statute as authority for deciding a case arising under the other statute. *See, e.g.*, ***Aquila Foreign Qualifications Corp. v. Director of Revenue***, 362 S.W.3d 1, 4-5 (Mo. banc 2012), which applied a definition of "processing" from § 144.030.2 to a case arising under § 144.054.2.

apparatus. Since, the Director continued, the raw granite was not entirely consumed, it had to be an "apparatus" in order to be a "material."

In response, the Court pointed out first that prior cases interpreting "material" for Chapter 144 purposes did not use the term "material" to refer to an apparatus; and second, held that, under the plain meaning of the statute, raw granite slabs are "materials used *or* consumed" to manufacture granite countertops.[14] (Emphasis added.) Therefore, because the raw granite was used to create the countertops, the taxpayer was entitled to the exemption.

Accordingly, even if the ***E&B Granite*** court did not reject the alternative definition of "material" as an apparatus, it reduced that definition to *dicta*, all the more so since no subsequent decision of any Missouri court or of this Commission has held that an item qualified (or did not qualify) as "material" for purposes of Chapter 144's exemption statutes because it was an "apparatus." Nonetheless, Alberici bases its claim that its cranes and welder were "materials" for purposes of § 144.030.2(5) on the second dictionary definition of "material," and cites the Court's statement that "material" *can* be an "apparatus necessary for doing or making something" as the governing rule of this case.

To test Alberici's contention, we interpret the relevant portion of the statute it cites. The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language.[15] A court will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result.[16] We apply that plain meaning rule to Alberici's argument that its rented cranes and welder were "materials" because they were apparatuses. Doing so, we return first to *Webster's Third New Int'l Dictionary* for a relevant definition of "apparatus:"

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[14] 331 S.W.3d at 318.
[15] ***Bateman v. Rinehart***, 391 S.W.3d 441, 446 (Mo. banc 2013).
[16] *Id.*

> any compound instrument or appliance designed for a specific mechanical or chemical action or operation : MACHINERY, MECHANISM .[17]

Then, to that dictionary's definition of "crane;"

> A machine for raising and lowering heavy weights and transporting them through a limited horizontal distance while holding them suspended.[18]

And then to the definition of "welder;"

> A machine used in welding.[19]

Therefore, both a crane and a welder are described as "machines." Continuing this analysis, we note the relevant dictionary definition of "machine:"

> **f** (1) **:** an assemblage of parts that are usu. solid bodies but include in some cases fluid bodies or electricity in conductors and that transmit forces, motion, and energy one to another in some predetermined manner and to some desired end (as for sewing a seam, printing a newspaper, *hoisting a load, or maintaining an electric current*) **(2) :** an instrument (as a lever) designed to transmit or modify the application of power, force, or motion[.20]

Finally, we turn to the dictionary definition of "material," this time adding the examples it provides using "apparatus" as a synonym for "materials;"

> **2 a :** apparatus (as tools or other articles) necessary for making or doing something – *usu. used in pl. <needed writing ~s> <library ~s>*[.21]

Those examples refer to "*writing* materials" and "*library* materials," which are quite different in category and type from machines such as cranes and welders.

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[17] *Webster's Third New Int'l Dictionary* 102 (unabr. 1986).

[18] *Id*. at 529.

[19] *Id*. at 2594; *see also* ***Parker v. Springfield Ry. Servs./Anheuser-Busch, Inc***., 897 S.W.2d 103, 104-05 (Mo. App., S.D. 1995 (welders are machines), *overruled on other grounds by* ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220, 224 (Mo. banc 2003). Welders function by delivering electricity through cables that energize a wire or welding rod. ***Loyd v. Ozark Elec. Co-Op, Inc***., 4 S.W.3d 579, 585 (Mo. App., S.D. 1999), *also overruled on other grounds by* ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d at 224.

[20] *Id*. at 1353 (emphasis added).

[21] *Id*. at 1392 (emphasis added).

Thus, we return to the rule of ***Bateman v. Rinehart***: we must, if possible, effectuate legislative intent through the plain and ordinary meaning of the statutory language. Did the legislature *intend* in § 144.030.2(5) for "materials" to include machines such as cranes and welders? The plain language of the statute answers the question:

> There are also specifically exempted from the provisions of…sections…144.600 to 144.761…:
>
> * * *
>
> (5) [M]aterials…solely required for the installation or construction of…machinery and equipment, purchased and used to establish new or to expand existing manufacturing, mining or fabricating plants in the state if such machinery and equipment is used directly in manufacturing, mining or fabricating a product which is intended to be sold ultimately for final use or consumption[.]

Had the legislature intended to exempt "*machines (or machinery)*[22]…solely required for the installation or construction of machinery and equipment, purchased and used to establish new or to expand existing manufacturing, mining or fabricating plants in the state," it could have said so, having already used the word *machinery* in the same sentence. Instead, Alberici asks us to accept that "apparatuses" and "materials" are, *invariably*, synonyms. The examples cited in the dictionary indicate clearly that they are not; and in this instance, the cranes and welders are more accurately described as "machines" than as "materials."

We therefore conclude that Alberici's rented cranes and welders were not "materials" exempt from taxation pursuant to § 144.030.2(5). And because they were not "materials," Alberici is not entitled to a refund of the use tax it paid on the rental of its cranes and welder.

Is the delivery charge subject to use tax?

Alberici also claims it is entitled to a refund of the use tax it paid to Bulldog Erectors for transporting one of the rented cranes to the Manufacturing Facility job site. The contract

[22] Or for that matter, *equipment*.

between Alberici and Bulldog Erectors obligated Alberici to "arrange for and pay all shipping and freight from the shipping point to the job site…." Alberici notes, correctly, that the contract did not obligate Alberici to pay Bulldog Erectors for transporting the crane to the job site. Therefore, it argues, the delivery charge was not taxable because it had the option of avoiding that charge by using a transporter of its choice.

Alberici cites ***Brinson Appliance, Inc. v. Director of Revenue***[23] as authority for its position. In that case, Alberici asserts, "the Court concluded that the 'sales price' under the use tax law was the same as 'gross receipts' under the sales tax law. Therefore, the question whether a delivery charge is taxable turns on whether the delivery was part of the sale of the property. Because the cost and means of delivery were up to the customer, the delivery charge, even from the vendor of the property so delivered, was not taxable."[24]

We think Alberici applies ***Brinson Appliance*** too broadly, and ignores the broader rule on which that case rests. While Alberici's assertion that the question in that case whether a delivery charge is taxable turned on whether the delivery was part of the sale of the property was correct so far as it went, the broader rule to which we refer was stated by the Court in ***May Dep't Stores Co. v. Director of Revenue***, about which ***Brinson Appliance*** said:

> In [***May Dep't Stores***], this Court held that the guiding factor in determining whether a delivery charge was a part of the sale was the intent of the parties, and where the parties did not intend the cost of shipping to be part of the sale, such charges were not part of the sales price subject to use tax.[25]

This case differs from ***Brinson Appliance*** in at least one crucial fact: in ***Brinson Appliance***, the taxpayer simply had a policy of hiring a third-party contractor to deliver the appliances to its

[23] 843 S.W.2d 350 (Mo. banc 1992).
[24] Petitioner's brief p. 11.
[25] 843 S.W.2d at 352.

customers, while in this case, the agreement between Alberici and Bulldog Erectors was memorialized in a single written contract.

While the four corners of that contract did not require Alberici to pay Bulldog Erectors for that service, the contract set out a charge to be paid to Bulldog Erectors for the service, and Alberici paid that charge. Paragraph 6 of that contract, titled "TRANSPORTATION," obligated Alberici to "arrange for and pay all shipping and freight from the shipping point to the job site…." It did not, explicitly, obligate Alberici to pay those costs to Bulldog Erectors. However, that paragraph also stated:

> Inbound Transportation: $15,000.00
> Outbound transportation: $15,000.00

The parties disagree as to whether this language was preprinted on the contract form or added later, but we think that issue is irrelevant in light of the greater rule stated in ***May Dep't Stores*** that the parties' intention controls.

To determine that intention, we must construe the contract between Alberici and Bulldog Erectors. The general rule for construction of a written contract is that, absent ambiguity, the intent of the maker of a legal instrument is to be ascertained from the four corners of the instrument without resort to extrinsic evidence. Extrinsic evidence is not admissible to vary, add, or contradict terms of an unambiguous and complete written document.[26]

In this case, the instrument is complete, but there is an ambiguity within the four corners of the contract whether Alberici *agreed* to pay Bulldog Erectors for transporting the crane. That ambiguity may be resolved by extrinsic evidence.[27] Such extrinsic evidence includes the parties' performance of the contract.[28] In this case, Alberici paid the $15,000 charge set out in the

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[26] ***In re Estate of Collins***, 405 S.W.3d 602, 607 (Mo. App. ,W.D.,2013).

[27] ***West v. Sharp Bonding Agency, Inc***., 327 S.W.3d 7, 15-16 (Mo. App., W.D. 2010).

[28] ***Boone County by and through Butcher v. Blue Cross Hosp. Serv., Inc.,*** 526 S.W.2d 853, 857 (Mo. App., K.C.D. 1975).

contract on November 20, 2008, 16 days after the date of the contract. The fact that Holcim subsequently executed a sales/use tax exemption certificate in favor of Alberici means nothing in this context, as it was not executed until May 11, 2010. If interpretation of a contract is necessary, the rule is that the contract is interpreted so as to effectuate the parties' intent *at the time of contracting*.[29]

Because the parties intended at the time of contracting that Alberici would purchase transportation services from Bulldog Erectors, the charge for those services was part of the sale price, and therefore subject to use tax. Alberici is not entitled to a refund of the use tax it paid for purchasing that service.

Significance of the tax exemption certificate given by Holcim to Alberici

The Director complains that the above-referenced exemption certificate given by Holcim to Alberici was not given in good faith. However, while the Director asserted that Alberici cited the exemption certificate in its refund claim, Alberici did not mention the certificate in its post-hearing briefs. Therefore, we consider Alberici's argument, to the extent it was made (and it was not raised at the hearing), to be abandoned.

Summary

The cranes and welder Alberici rented for use in constructing the Manufacturing Facility were solely required for the installation or construction of machinery or equipment at that facility. However, the cranes and welder were not "materials" for purposes of § 144.030.2(5). Therefore, Alberici's rental of the cranes and welder is not exempt from use tax under that statute. Also, Alberici's payment of the cost of transporting one of the rented cranes is not exempt from use tax because the parties intended, at the time they entered into their agreement to

[29] ***Golden Rule Ins. Co . v. R.S.***, 368 S.W.3d 327, 334 (Mo. App., W.D. 2012), *quoting* ***Miller v. O'Brien***, 168 S.W.3d 109, 114 (Mo.App., W.D. 2005) (emphasis added).

rent the crane and have it transported, to include the transportation cost into their agreement. Therefore, Alberici is not entitled to the refunds of use taxes that it seeks.

SO ORDERED on October 10, 2013.

\s\ Marvin O. Teer, Jr.
MARVIN O. TEER, JR.
Commissioner